United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
MORRIS CIZNER

76-7519

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTHONY MUNOZ,

Plaintiff-Appellee,

—against—

FLOTA MERCANTILE GRANCOLOMBIANA, S.A.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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Statement

This case was tried before Judge Edward Weinfeld and a jury and the jury found in favor of the plaintiff. A motion for a directed verdict had been made and was denied. Post trial motion to set the verdict aside was denied by Judge Weinfeld by written Opinion (3a-4a).*

Issues

1. Does the mere fact that stevedore created a dangerous condition on board ship in the course of stowing cargo relieve shipowner of all liability to stevedore's injured em-

* Cited numbers with letter "a" refer to Joint Appendix.

ployee even though that part of the stow had been completed; shipowner had participated in the stowing activity; was in control of the vessel, the escape hatch and the stow in question; had notice of the dangerous condition for sufficient time to take corrective action and warn workmen on board; was obligated to furnish dunnage and separation paper for use in the stow; was on board ship at all times; the dangerous condition was a pathway leading to an escape hatch; the accident occurred while men were working in a different area in the hatch loading different cargo destined for a different port but the pathway in question provided access to the place of work; shipowner furnished, maintained and supplied the escape hatch and its pathway in its dangerous condition to the longshoremen for use; and shipowner was negligent as found by the jury?

2. Did the vessel breach any duty it owed to the *longshoremen* not the duty owed to the stevedore and its longshoremen as claimed in the Amicus Curiae Brief?

Testimony

Plaintiff, a longshoreman employed by Universal Maritime Service, was injured in the lower hold of Hatch No. 3 of defendant's vessel on November 6, 1973 when the flooring of the pathway to an escape hatch gave way under him.

The day before the accident the forward and aft parts of the lower hold were loaded and cargo was stowed until 9:00 P.M. when the stowage was completed. The cargo consisted of general cargo of boxes, cartons, and bags. The longshoremen left the hatch and did not return until the next day (November 6, 1973) at 8:00 A.M. to load cargo

of rolls or reels in the square of the hatch. (25a-26a, 95a-96a, 100a). They were working in the square between cargoes (51a).

The escape hatch at the aft end was blocked by cargo and when cargo was stowed in the forward end a pathway was built into the stow. (25a-26a, 48a-49a, 54a).

> "Q. What was the purpose of this path that you have been describing? A. Well, the purpose of the path is if something should happen you have to have a way to get out of the ship.
>
> Q. Was this path leading to the escape hatch? A. Yes, sir.
>
> Q. How far away was the escape hatch from where you were standing again by the reel in the square of the hatch? A. I'd say a good 15 feet.
>
> * * * * *
>
> Q. Would you explain to the Court the purpose of this pathway leading to the escape hatch? A. Well, like I said, the purpose of the escape hatch is in the event something happened, someone should get sick or a fire should break out or anything. You have to go —that is the only way to get out of the ship, down the lower hold." (26a-27a).

The pathway was about 2-3 feet wide and about 15 feet long from the reels in the square to the escape hatch. On both sides of the pathway and rising above it were cases, cartons, bags and other general cargo. The flooring of the escape hatch pathway consisted of this general cargo and was covered by separation paper (26a-27a, 31a). The purpose of using this paper is to separate cargo going to different ports. The separation paper had to be in the stowed cargo separating the cargo above from that which was

below it. The general cargo in the pathway was covered by this separation paper which did not run lengthwise like a runner but was placed across the pathway. You could not tell the length of the separation paper because cargo was on top of it (so the paper was placed in the stow before stowage was completed on November 5th). There was separation paper in the stow even though all of the cargo in the forward stow was going to one port. (27a, 57a, 63a, 97a).

The escape hatch pathway was at an incline, uneven, not level or flat with the cartons and cases underneath the paper protruding. (56a-57a).

This cargo included the separation paper which was covering the visibly uneven general cargo in the escape hatch pathway.

> "Q. But you say the separation paper was right down the path? A. No. Laid across.
>
> Q. Crossways? A. Yes.
>
> The Court: Had this cargo on which you were walking, which you say was a path already, placed in position?
>
> The Witness: Yes.
>
> The Court: It was in its regular position?
>
> The Witness: Yes, it was stowed. *Completely stowed.*
>
> The Court: And you say there were bags, cartons, whatever it was?
>
> The Witness: Yes, whatever it was.
>
> The Court: There was separation paper over it?
>
> The Witness: Right." (57a-58a).

Both parties also stipulated "that the cargo that was loaded forward of the rolls and *on which Mr. Munoz was walking* when he fell was *loaded the day before* his accident by Universal Stevedores." (83a).

Defendant also admitted in its answer in Paragraph VI (Docket Entry 3, Page 2a) "That at all the times mentioned and prior thereto the defendant manned said vessel and its Master, Officers and crew were on board said vessel and in possession of same except at *those times* when portions of said vessel were manned and in the possession of an independent contractor."

Plaintiff was an extra man who came to work at about 9:00 A.M., November 6, 1973 and the longshoremen were working in the square of the hatch only (11a, 19a). He went up the escape hatch pathway about 3 steps to get a crowbar for use in the stowing of the reels of cargo in the square. He had to walk a distance of 6-7 feet on the pathway on the separation paper on the cargo (78a-79a). He had no other way to go. He felt the floor move underneath him and his foot went through the separation paper into a hole up to his knee (82a). His description of the escape hatch pathway [illegible] "There was plenty wrong with it. There was ple[illegible]ong with it." (66a) And "It wasn't the best tiering job I ever saw. It wasn't the safest either but I had no choice. There was no other way to get the bar. And you had to go up there. There was no choice." (62a).

While working in the square and loading the reels, when the first tier was finished the longshoremen asked for dunnage and got it (51a). By its agreement with the stevedore the defendant was to supply the dunnage, paper and separation cloths. (Defendant's Exhibit Q, Page 163a).

I.

Discussion.

The forward and aft ends of the hatch in question were fully loaded the day before the accident. The escape hatch at the aft end was blocked. The cargo at the forward end was so stowed that in order to provide a means of escape or leaving the hatch, particularly in the event of an emergency, a pathway was built into the stow leading from the square to the escape hatch. The pathway ran from the square a distance of 15 feet; was 2-3 feet wide, was inclined with cargo rising on both sides. The floor for this escape hatch pathway was uneven consisting of general cargo of bags, cartons, crates and the like of differing sizes, shapes and hardness, and pieces of cargo protruding or jutting upward in various places. All of this cargo constituting this escape hatch pathway was covered by separation paper as is used in a stow to separate cargo going to different ports. Obviously the pathway was visible both from the entrance of the escape hatch and by looking down into the square from the deck.

The stowage of cargo was fully completed in the forward end the day before the accident. Plaintiff did not work that day. The next day plaintiff for the first time came to this hatch and found he could enter the square by means of a free-standing loose ladder. Longshoremen were loading reels or rolls of paper in the square. It is apparent that as the cargo was stowed in the square the free-standing ladder would have to be moved and no longer used. While using this escape hatch pathway to get a crowbar in con-

nection with the work performed in the square, plaintiff's leg went through the separation paper into the stow causing his injury.

It should be here noted that the cargo being stowed on the day of the accident was not general cargo as that which had already been stowed at the forward end; it was being stowed in a different part of the hatch (the square); and was going to another port other than to which the forward end cargo was destined. The place of work at the time of the accident was the square of the hatch. The place of the accident was an escape hatch pathway leading to and from the place of work in the square.

From the foregoing the escape hatch pathway was a condition existing on the vessel finished and completed the day before the accident. It existed from at least 9:00 P.M. until 10:00 A.M. (13 hours) when the accident occurred and was of such width, length and in such a location as to be visible to the ship's crew.

Compounding the dangerous condition was the separation paper covering the escape hatch pathway. Dunnage of the type that would have evened out the cargo, covered the holes or spaces in the stow or provided a firm supporting walking surface should have been used but was not. There was no need to use the separation paper in the stow as all of the forward end cargo was going to one port. Seeing separation paper in the stow should have alerted shipowner or its crew to look and examine more carefully. In addition, it must be remembered that the shipowner supplied this separation paper to the stevedores for use in the stow.

It was plaintiff's claim that shipowner knew or should have known that a pathway had to be built in the stow of

general cargo leading to the escape hatch; that separation paper was supplied by them for use in the stow for no apparent reason as all the cargo was going to the same port so shipowner should have inquired, inspected and ascertained the use to which it was put; that since the forward stow was to be placed at the escape hatch a ship's officer should have repeatedly inspected the escape hatch to make sure it was accessible and safe for use; *that shipowner did not give the stevedore control of the escape hatch but to the contrary shipowner not only retained sole control and maintenance of the escape hatch but also had a greater demanding duty to make sure it, including its approaches, was reasonably safe for use because of its intended purposes;* that concomitantly with such duty shipowner should have exercised great care to see that the escape hatch was not blocked and the pathway leading thereto was reasonably safe for use; or put another way, they should have exercised reasonable care to see that the access pathway leading to and from the place of work was suitable for the purposes intended and reasonably safe for use; that this escape hatch, its access pathway and for that matter, the entire hatch, was under the sole control of shipowner from 9:00 P.M. on November 5th to 8:00 A.M. on November 6th, when stevedores returned to the ship to work only in the square and so shipowner had ample time to ascertain and know of the dangerous condition and take corrective action and warn the longshoremen.

The jury was charged that basic to the plaintiff's recovery is a finding that in fact a dangerous condition existed and shipowner had notice thereof (pages 110a-111a and Judge Weinfeld's Decision, 3a).

The jury having found for the plaintiff must have found that a dangerous condition existed and that shipowner had notice of it. The jury also found plaintiff free from contributory negligence.

II.

Shipowner retained control of the vessel and was in control of the dangerous condition furnishing plaintiff with an unsafe place to work, and an unsafe escape hatch pathway leading to and from the place of work. Stevedore did not have *sole* control of the loading of cargo.

There are certain admissions in this case which show quite clearly that the shipowner retained sufficient control of the vessel, the hatch in question, the escape hatch, the escape hatch pathway and the stevedore's activity including participation in the loading operations so that it did have the duty to exercise reasonable care to provide plaintiff with a reasonably safe place to work (108a) and is liable for failure to do so.

1. Defendant's Answer (2a—No. 3 of Docket Entries). In Paragraph VI of the answer defendant admits that at all the times defendant manned the vessel and its Master, Officers and crew were on board the vessel and in possession of same except *at those times* when operations of the vessel were manned and in possession of independent contractors. In Paragraph VII defendant admits it managed, operated, maintained and controlled said vessel except *portions* managed, operated, maintained and controlled by independent contractors.

The following is obvious from the foregoing:

(a) The crew was on board the vessel and was in over-all control of the vessel.

(b) When the longshoremen left on November 5th at 9:00 P.M. the night before the accident, the Callao cargo at the forward end of No. 3 hatch was already loaded; the cargo of rolls of paper destined for Bona Ventura were being loaded in the square behind the Callao cargo on November 6th (100a-102a). The loading in the square of that hatch on November 6th started at 8:00 A.M. (96a). The cargo that was loaded forward of the rolls and on which plaintiff was walking when he fell was loaded by Universal Stevedores the day before his accident (83a). Obviously the hatch, the stow, the escape hatch and its access pathway was in the possession of and manned by the shipowner exclusively for a period of 13 hours; that during that time shipowner operated, maintained and controlled the entire vessel.

(c) That there was sufficient time for shipowner to discover the dangerous condition and warn the longshoremen and take corrective action.

(d) When shipowner turned over the square of No. 3 hatch on November 6th to the stevedores for loading in the square, they did so with a dangerous condition existing with respect to the escape hatch and its pathway, which led to and from the place of work in the square.

2. The shipowner's contract with stevedore (158a-169a):

(a) Paragraph 9 of the Contract (163a) sets forth that shipowner was to supply dunnage, paper and all materials

for shoring, etc.; in addition, the ship was to supply booms, winches, sufficient steam or current for their efficient operation, lights for night work, etc.

(b) The Contract sets forth work to be performed by stevedore and rates of pay therefor. Nowhere is there set forth that stevedore is to maintain a completed or finished portion of the work or maintain an escape hatch or its access pathway previously created. Stevedore not being paid for maintenance would not be expected to voluntarily do so leaving shipowner with the problem of maintenance.

(c) The work stevedore is required to do is to be performed to the satisfaction of shipowner (158a). Implicit in this is that shipowner have someone present inspecting and satisfied as to performance, both in the performance and the result. In either or both events, shipowner has the duty to pass judgment on activities and work product of stevedore and if necessary, direct changes. Thus, shipowner participated in the loading operations.

In *Bess* v. *Agromar Line,* 518 F.2d 738 (4 C.A. 1975) which is cited by shipowner several times and misinterpreted, plaintiff was injured while loading cargo of bales. Because of uneven size there was space between the bales. He requested plywood of the stevedore to make a better work surface but none was supplied. He was injured when he went into a space. The Court stated that the vessel was a safe place to work when turned over to stevedores and the *crew was absent from the vessel* during the entire loading operations (neither of which is present in our case). The ship's crew was, therefore, not aware of the unsafe condition and could not reasonably have learned of it. (No notice.) Plaintiff there further claimed that shipowner had

the duty to provide suitable plywood dunnage to be used in covering the bales and breached that duty thereby contributing to the unsafe condition. The Court held that that theory of liability was good but there was no evidence before the Court that shipowner owed any duty to provide dunnage or make it available.. The undisputed facts in our case compel holding shipowner liable under the *Bess* case.

III.

Shipowner had the duty to exercise reasonable care to provide plaintiff with a reasonably safe place to work. If a dangerous condition existed not readily apparent to persons exercising reasonable care and if shipowner had actual or constructive notice of the dangerous condition, then shipowner was required to give such persons warning of the danger and to correct the condition.

Defendant shipowner had moved for a directed verdict. Judge Weinfeld denied the motion (3a) quoting from the charge to the jury and pointing out that the defendant claimed at the trial (as they do on this appeal) that the condition complained of was a latent condition; that the law with respect to latent conditions was charged and no exception thereto was taken. The Court found the evidence sufficient to support the jury's finding under the instructions given.

The defendant on this appeal now claims that this case should not have been submitted to the jury as there are no questions of fact to be decided and shipowner as a matter of law is not liable to the plaintiff. Defendant is in error. Having failed to take exception to the Charge above re-

ferred to, there is no reason to permit them now to claim that the Trial Judge was wrong in his Charge.

Furthermore, a reading of the Charge to the jury clearly shows the fairness, clarity, and legal accuracy of the instructions given.

Judge Weinfeld's decision cites a number of cases which is in conformity with the charge to the jury and the holding of the courts in the Second Circuit.

Frasca v. *Prudential Grace Lines,* 394 F. Supp. 1092 (D. Md. 1975); and *Crowshaw* v. *Koninklijke Nedlloyd, B.V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975) which are cited in the decision, set forth the modern view of shipowner's liability to a longshoreman, namely, that their duty is to exercise reasonable care to furnish the longshoremen with a safe place to work and to take reasonable precautions once shipowner has actual or constructive knowledge of dangers arising thereafter. Even where the condition is open or obvious, knowledge of the danger by the plaintiff does not necessarily relieve the owner of its obligation to take further precautions to remedy the dangerous condition if the owner should expect that the longshoreman will not discover or realize the danger or if the longshoreman will not protect himself against it, or shipowner should otherwise anticipate the harm despite such knowledge or obviousness. The shipowner's duty is held to be that which is set forth in the Restatement (2nd) of Torts and its various sections including 343 and 343A are set forth.

In *Napoli* v. *Hellenic Lines Ltd.*, 536 F.2d 505 (2 C.A., May, 1976), this Court subscribing to the modern view held that the shipowner is required to exercise reasonable care under the circumstances to furnish plaintiff with a reason-

ably safe place to work. The condition complained of in *Napoli* was one arising after the longshoremen started their work because of snow on a deckload of drums on top of which was placed plywood. The plaintiff there slipped on the plywood or the plywood slipped on the drums. There was also a dispute as to whether the plywood had been placed on the drums by the ship's crew or the longshoremen. In the Court's view it apparently did not make a difference whether placed there by crew or longshoremen. The shipowner there claimed that the only obligation it had to a longshoreman was with respect to a hidden condition unknown to both stevedore and longshoremen (coupling the two together), but if either stevedore or its employees knew of the dangerous condition or it was an obvious one, then there was no responsibility on shipowner's part to warn the longshoremen of such condition. The Lower Court in effect charged the shipowner's request. On appeal the verdict was reversed because of this charge, the Court holding that they were applying the modern or present-day view of shipowner's obligation. Even under circumstances most favorable to shipowner, namely, an open and obvious dangerous condition, this Court applied Section 343A of the Restatement holding that a vessel is liable to longshoremen for injuries resulting from obvious danger which it should reasonably anticipate that they would be unable to avoid. That since Napoli had to stand on the plywood to carry out his duties the vessel might reasonably anticipate that he might not be able to avoid the danger despite its obviousness. (Likewise, in our case Munoz was told to and had to use the pathway to get to the crowbar and while doing so he was injured.) Thus, it does not make a difference who created the dangerous condition, if shipowner had notice of it (as the jury found). Shipowner was negli-

gent in not obviating the danger. The obviousness of the dangerous condition merely goes to the question of plaintiff's contributory negligence and not to shipowner's liability.

Surely, if such is shipowner's duty as to an obvious condition, it has at least such duty as to a latent condition. The reasoning used by this Court in *Napoli* is equally applicable to our case. In view of the fact situation in our case with the control of the shipowner over the vessel, the escape hatch, the completed stow, and work area and their participation in the work being performed by stevedores, we need go no further in the application of the law heretofore set forth to find shipowner liable. However, even if there were not such control and participation by shipowner, the latter would be liable, for Section 413 of the Restatement pertains to a contractor who is performing work which is likely to create a peculiar unreasonable risk of physical harm to others unless special precautions are taken. If special precautions are not taken, the shipowner would be held liable for failing to exercise reasonable care to provide in some manner for the taking of such precautions. An example given in the commentary of the Restatement is that of a wall that is built which collapses because it is not braced. Comparably—in our case a walkway leading to an escape hatch that is built in a stow and not supported gives way. Special precautions should have been taken by using suitable, sturdy and supportive dunnage not only because it was an escape hatch pathway, but because of the general mixed cargo of cartons, boxes and bags. Under this section in any event shipowner would be liable.

IV.

Intent of Congress and the Amendment to the Act compel the holding that shipowner is liable in our case.

Although our action is a simple negligence case, a reinterpretation of the 1972 Amendment to the Longshoreman and Harbor Workers' Compensation Act is sought by shipowner with the hope presumably that the Courts will read into the Act that which does not exist nor that which Congress intended. To achieve their purpose, the shipowner has distorted the intent of Congress. See *Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756 (2 C.A. 1975), cert. den. 44 U.S.L.W. 3398 (Jan. 12, 1976).

Both the Senate and House Committees' reports to Congress recommending passage of the 1972 Amendment (H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 6 (1972) and S. Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972); Benedict on Admiralty, 7 Ed., Vol. 1A, 1973, Appendix B) sets forth very simply that the last Amendment to the Act in 1961 provided inadequate income replacements for disabled workers and "a substantial increase in benefits is urgently required". Also, longshoring being a high risk occupation, every appropriate means should be applied towards improving working conditions and "which maximizes *industry's* motivation to bring about such an improvement."

Congress also eliminated the longshoreman's remedy against the vessels for unseaworthiness in third party actions but longshoremen retained the right to recover damages for negligence against the vessel. The quoted portions of the lengthy hearings referred to on Pages 8 and 9 of shipowner's brief allegedly as to the "standard of care

owed the longshoreman" is not only taken out of context and hence misleading, but actually refers to the question whether the shipowner and stevedore may be permitted to make "hold harmless" or indemnity agreements as between themselves. It is submitted that whatever discussions were had between a representative of the employers (Scanlon) and minority counsel, particularly on an irrelevant subject, is of no meaning here. Parenthetically, the hold harmless and indemnity agreements referred to were held by Congress to be against public policy and the reason given by Congress was "superior economic strength" of shipowners, vis-a-vis stevedores, permitting them to nullify the effects of the Amendment to the Act.

The Committees' reports and thus the intent of Congress was not to lessen shipowner's duties to longshoremen and felt it would increase the safety on board vessels by

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work.
>
> "Thus, *nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous* condition". (H.R. Rep. No. 92-1441 and S. Rep. No. 92-1125, *supra;* Benedict B-9, *supra.*)
>
> "The vessel will still be required to *exercise the same care* as a landbased person in *providing a safe place to work*". (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125, *supra;* Benedict B-9, *supra*).

And the care required is *reasonable care* commensurate with the dangers to be encountered. It should be noted that the Committee stated that "longshoring remains one of the most hazardous types of occupations" (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125 *supra;* Benedict B-10 *supra*) so that the standard of care is necessarily a high degree of care.

To clearly set forth Congressional intent that the shipowner continues to owe to a longshoreman the duty to furnish him with a safe place to work and requires him to correct a dangerous condition if he knows or should have known of same, the Committee reports set forth the following example:

> *"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that:* 1) *the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it;* or 2) *the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances".* (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125, *supra;* Benedict B-9 *supra*)

Therefore, where a dangerous condition exists on deck Congress intends that:

1. Shipowner is deemed to be in control of the vessel sufficiently to require him to (a) furnish a longshoreman with a safe place to work; (b) discover any dangerous condition; and (c) correct the dangerous conditions.

2. Shipowner is liable in damages if it (a) *created the dangerous condition* or *knew it was there* (*actual notice*) *and failed to correct* the condition, *or* (b) had *constructive notice*, i.e. the condition existed for such a period of time it *should have been discovered and corrected* by the vessel *in the exercise of reasonable* care under the circumstances, but failed to do so.

3. It makes no difference who creates the condition or how and when created; liability of the shipowner follows failure to correct or remedy same. Where constructive notice is claimed, the standard of reasonable care under the circumstances is applied in discovering and correcting the condition.

Nor did Congress intend to relieve shipowner or permit the shipowner to relieve himself of responsibility for unsafe conditions on board a vessel. Congress looked to the shipowner to so conduct their vessel so as to reduce injuries to longshoremen. The obligation to improve occupational health and safety is imposed on shipowner and both Committee reports contained a direct threat addressed to the shipowner stating "The Committee expects to see further progress in reducing injuries and stands ready to immediately re-examine the whole third party suit question if it appears that the changes made in present law by this Bill have affected progress in improving occupational health and safety". (H.R. Rep. No. 92-1441 and S. Rep. No. 92-1125, *supra;* Benedict B-10 *supra.*

In what way the Amendment and the Congressional Committees' reports do not permit the shipowner to be held liable under the circumstances in our case is somewhat incomprehensible. To the contrary, the intent of Congress compels holding shipowner liable.

V.

Defendant shipowner is in error in its interpretation of applicable law and the import of cases cited.

Defendant confuses various concepts in their brief and hence is in error in interpretation of applicable law. For example, they cite *West* v. *The United States*, 361 U.S. 118 (1959) and quote therefrom on page 11 of their brief. A fair reading of the case, including the omissions from the quote represented by the asterisks would show defendant misunderstood the holding therein. In the *West* case the vessel was a dead ship with no crew signed on and was being completely overhauled. The contractor was to have complete responsibility and control of the repairs. Shipowner had "no control of the ship in the ordinary accepted context". The plaintiff was injured due to a defective plug —a plug listed as one of the things to be repaired by the contractor. The Court held that since shipowner had no control over the vessel or power to supervise or control repair work, they should not be held liable. The "no control" referred to was that no crew was on board nor signed on. Thus, the *West* case holding does not bear out defendant's contention.

Defendant also confuses the concept held in some cases that shipowner is not responsible for the negligence of stevedore for the manner or method in which stevedore or employees of stevedore perform their work. The correct emphasis is *in the performance* or *while* performing their work. In effect, these cases refer to operational negligence and not to conditions created and left on board ship. In our case it is claimed defendant was negligent and such negligence was not derivitive.

It is submitted that shipowner's obligation to furnish a safe place to work is not limited to the time stevedores commence working—it is a continuing duty. There are other factors to be considered as has been previously indicated including the question of *sole* control and dangers created *as* unloading proceeds (and not finished as yet) or defective equipment in the process of being repaired.

Nor are the cases cited in defendant's brief similar to our facts. *Ramirez* v. *Toko Kaium K.K.*, 385 F. Supp. 644 (N.D. Calif. 1975), turned on the question of the method used in the unloading of pipe. An improper method of discharging caused a load to spill. The stevedore chose the method and was to supply "on the spot dunnage" but did not do so. There was nothing unusual about the stow. The Court stated that the method of unloading was not the safest but the stevedore chose the method and the shipowner could not have made the stevedore use a different method. The stevedore chose not to use on the spot dunnage. There was also no evidence that the shipowner knew of the method of unloading nor did it have authority to change the procedure if it discovered the danger. In substance, this was operational negligence on the part of the stevedore who was required to supply its own dunnage and the shipowner had divested himself of all rights to designate or change the method or manner used by the stevedore whose own employee was injured in the course of negligence operation.

They also cited *Teofilovich* v. *D'Amico Mediterranean Pacific Line*, 415 F. Supp. 732 USDC (C.D. Cal. 1976) which turned on the question of no notice to shipowner of a minute detail of the work. The italicized quote at page 16 of defendant's brief is distinguishable from the facts in

our case in that the dangerous condition in our case involves a condition that was under *shipowner's* sole control for almost half a day. Our accident occurred neither because of the manner or the method in which stevedores performed their work but as a result of the condition created by the work performed and *completed*.

Some comment should be made about the decision cited pertaining to construction cases. These cases and fact situations are not analogous and are totally different from our case on appeal. For example, in *Zucchelli v. City Construction Co.*, 4 N.Y.2d 52 which is quoted on pages 17-18 of defendant's brief, plaintiff's employer was pouring concrete on a floor in a building being constructed. Supporting the floor for such work was wooden shoring beneath it. Plaintiff's co-employees had placed forms and the shoring in place and then negligently removed a form bracing the shoring. While pouring the concrete, the shoring shifted and the floor collapsed. All of this work was done by the employer and planking and forms were part of the equipment. The Court held that although the owner has an obligation to furnish a contractor's employee with a safe place to work, that does not make the owner liable for the contractor's own plant, tools and methods; that the Labor Law requires owner to make and keep safe the place of work but that does not include the sub-contractor's own plant and equipment or the work he is doing. The Court stated that the reason for their holding was that the place of the accident was "work in progress" and solely within the control of the employer. The shoring and bracing were part of a contract that also called for pouring the concrete on it.

Thus, in *Zucchelli* the employees were working on the unbraced shoring pouring the concrete as part of the work

in progress. In our case the work to be performed and the place of the accident had been completed the day before and no other cargo was to be placed on top of it.

Shipowner's confusion is obvious when they state at page 18 of their brief that in our case "the work being done by the stevedore, without dispute, was the cause of any condition which may have been responsible for the plaintiff's injuries and all persons involved are the employees of the independent contractor". Plaintiff *does* dispute the correctness of such claim. The work being done at the time of the accident was in the square of the hatch. The place of the accident was on a pathway in a stow of cargo that had been totally completed the day before and in a different location outside the square and nothing further was to be done to that stow. Therefore, "the work being done" did not cause the condition. Nor are all persons involved limited to employees of the independent contractor—it involved shipowner's employees as heretofore set forth. The other cases cited are generally inapplicable or involve such exceptions to the general rule as herein mentioned and are variously described as "work in progress" or "detail of the work being performed" or "prosecution of the work itself makes the place" or "negligent acts of the sub-contractor occurring as a detail of the work". These are all in the same vein and not applicable to our fact situation.

It would appear to be more to the point to refer this Court to the case of *Thorsen* v. *Slattery Contracting Co., Inc.*, 272 App. Div. 931, 71 N.Y. Supp. 2d 77. There the Court held that the fact that a structure was originally created by plaintiff's employer does not automatically insulate the general contractor against liability for accidents arising in connection therewith. Where general contractor

knows that employees of a sub-contractor have done their work so negligently as to occasion danger to a fellow employee, it is his duty to interfere and take reasonable means to see that the work is properly done and the danger removed.

Also, it would appear to be more in point to refer this Court to a most recent decision by the New York Court of Appeals pertaining to land owners' standard of care which should be applied to all those coming on his land. In *Basso* v. *Miller,* 40 N.Y.2d 233 (June, 1976), the Court held that the duty of the land owner is to act reasonably to maintain safe conditions in view of all the circumstances and the duty of the owner varies with the likelihood of plaintiff's presence at the particular time and place of injury. In the concurring opinion the Court makes foreseeability of injuries to others a prime consideration. The Court also comments on the varying economic burdens justifiably placed on the land owner to protect those on his property against harm.

VI.

Shipowners are asking this Court to adopt a view of their "duty" and "liability" which is contrary to congressional intent.

The position of the steamship companies in their *Amicus Curiae* Brief is completely in error replete with misconceptions of both fact and law and in any event is irrelevant to our case on appeal.

Shipowners reason their position by starting with *Napoli* v. *Hellenic Lines* as merely holding that land-based principles of negligence are to be applied in determining the

standard of care owed by the vessel and hence the basic issue of this appeal, as they view it (page 3 of *Amicus Curiae* Brief) was whether the vessel breached any duty it owed to the *stevedore and its longshoremen* employees.

The coupling of the stevedore and the longshoreman is wrong in every sense of the word. The shipowner's duty to and relationship with stevedores is entirely different from its duty and relationship to a longshoreman. This Court, in *Napoli* specifically stated that the shipowner was "required, therefore, to exercise reasonable care under the circumstances to furnish plaintiff with a reasonable safe place to work". The duty owed was to the individual longshoreman. Furthermore, if they had notice that a dangerous condition existed and had an agreement with stevedore for the latter to correct the condition but knew stevedore did not abide by the agreement, shipowner should have seen to it that the dangerous condition was corrected.

Shipowners do not seem to comprehend the facts testified to and the testimony in this case. This was not a situation where shipowner was out of control and the stevedore *solely* in control; the shipowners controlled, manned and possessed the vessel generally; operated the vessel; supplied the dunnage and paper used in the stow; shipowner solely manned, controlled and possessed the hatch, escape hatch, its pathway and stowed cargo at least from the time of completion of the stow in the forward area the day before the accident to the next day when the longshoremen came to work in the square of the hatch at 8:00 A.M. On the morning of the accident shipowner turned over the square of the hatch to stevedores to load cargo therein; it maintained an escape hatch and pathway leading to the work area which pathway was not reasonably safe for use; the place

of work was not safe for use as it did not have a reasonably safe escape hatch pathway leading to it as found by the jury.

It was never the intention of Congress to permit a shipowner to be relieved from responsibility for a fire exit or escape hatch opening and its pathway leading to it when it had notice of a dangerous condition, particularly when they manned and were in possession of the pathway and hatch in the condition complained of and turned the square of the hatch over to the stevedore knowing that the longshoremen would have to use the pathway while in such dangerous condition.

Shipowners further maintain erroneously, that Congress intended that "economic costs of the longshoreman's injury be borne by the party whose *real fault* caused the injury" and so the stevedore and the shipowner will have an incentive to provide safety on the job. From that they reason that since in their view only the stevedore can correct an unsafe condition, Congress intended that the party who is responsible for not correcting an unsafe condition is made to bear the costs of any injuries caused by it. In their view if that rule of law is not adopted, then once the vessel has knowledge of an unsafe condition created by stevedore, the stevedore has no incentive to correct it.

The trouble with the foregoing is that it is a mixture of fact and fiction. If the economic costs of injury is the Workmens Compensation payment (which is less than injured's weekly earnings) such payment is made by the stevedore and is wholly unrelated to fault. If shipowners mean by "economic costs" the award in damages in third party actions for negligence, they know full well that such damages are not limited to loss of earnings only; that the

employer cannot be sued for its fault or negligence, and the shipowner can be sued as a third party if it is at fault.

If shipowner's views are correct, then they never can be sued for their negligence (fault) as stevedore always allegedly has to provide for on the job safety as they claim and correct any unsafe condition that is created. Under those circumstances shipowner would have no incentive at all to act responsibly and promote safety on board its vessels. The incentive for safety mentioned in the Congressional Committees' Reports was for the benefit of longshoremen and not the steamship company vis-a-vis the stevedore. To solve shipowner-stevedore problems by cutting down on the injured worker's rights and benefits is not conforming to Congressional intent.

It is surprising to find that shipowners interpret the object of increasing workmens compensation payments to longshoremen only as providing an incentive to stevedores to be careful. It does not occur to them that an injured longshoreman could not possibly support his family during disability on $70.00 a week. The increased payment was long overdue and the Congressional Committee Reports specifically say that the increased rate was fair and justifiable. The opening sentence of these reports states that the principal purpose is to amend the Act in order to upgrade the benefits, extend coverage, and to protect additional workers. It does not set forth that the principal purpose of the amendment is to provide incentives for shipowner and stevedore.

Congress recognized that longshoremen and even the stevedoring company needed protection from the shipowners. It was for this reason that Congress outlawed "hold harmless" and indemnity agreements between shipowners

and stevedores giving the reasons that shipowners have "superior economic strength" and if not prohibited, steamship companies would force stevedores to make agreements which would contravene the intent of Congress. As for shipowner's duty to longshoremen, the Committee Reports state that shipowner is still required to provide the longshoremen with a reasonably safe place to work and if the vessel knows or should have known of a dangerous condition they are required to take appropriate corrective action. Their failure to furnish a safe place to work, or after having notice, actual or constructive, of a dangerous condition but failing to correct same, is a breach of duty owed to the longshoremen, and if the latter is injured the fault is that of the shipowner. Uncoupling the stevedore-longshoreman vs. shipowner relationship as misconstrued by shipowners and viewed from the shipowner vs. longshoreman relationship as Congress intended should go a long way to clarify the *Curiae's* misconception and permit them to understand that when they breach a duty owed to a longshoreman they are at fault and hence liable for negligence.

The shipowners seem to overlook the holding in *Landon* v. *Lief Hoegh and Co., supra.* In *Landon* this Court set forth the intent of Congress in passing the Amendment to the Act, stating that it was a compromise between shipowners and stevedores, with the interest of longshoremen and employees paramount. (Not a three-way compromise as shipowners claim nor are the interests of shipowners paramount.)

The Court went on to explain that the compromise was to eliminate unseaworthiness claims against the shipowner and the stevedores could no longer be held liable for their breach of warranty of workmanlike performance. The long-

shoreman retained his right to sue the shipowner for negligence. The ship's negligence need not be *solely* responsible for a longshoreman's injury for an action to lie and in commenting thereon the Court stated that "Congress would hardly have given the ship so little incentive to avoid being negligence towards its longshoremen invitees", and described the scheme of the Act as providing Workmens Compensation for a longshoreman from his employer but with a right to sue the ship for negligence. They further stated that some negligence by the employer is not enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence.

Thus, not only is the so-called compromise between stevedore and ship and does not involve the longshoreman but the latter's right to sue the ship for negligence is preserved regardless of whether the stevedore is also negligent. In commenting on the increase and the rate of compensation paid to the longshoremen, the Court pointed out that such increase was a result of failure to revise the rates since 1961. The comment as to incentive is particularly revealing in the light of the position taken by shipowners in the *Amicus Curiae* Brief in which they seem so concerned with respect to the incentive of the stevedore.

It is submitted that Amici are somewhat confused in discussing cases under the 1972 Amendment. After setting forth their conception of the holding of a particular case, they force a consistency between the holding and their misguided view of the law which they would have the Court follow.

Detailed comment on the cases cited seems pointless in view of the foregoing. However, some comment could be

made with respect to some of them. For example, in *Bess* v. *Agromar Line, supra,* they recite on page 21 of their brief, that "As there was no evidence that the vessel had any duty to furnish dunnage, the Court held that the vessel was not liable for the longshoreman's injury". They go on to say that in our case it was the stevedore's obligation to furnish dunnage needed to eliminate any unsafe condition and, therefore, the accident was the fault of the stevedore and their suggested rule of law based on fault would be consistent.

The trouble with that reasoning is that in our case the shipowner was obligated to furnish the dunnage, the paper and other gear and equipment so the very basis of their reasoning falls and based on the *Bess* case the appeal in our case should be denied. It should be further pointed out that in the *Bess* case the crew was absent from the vessel during the entire loading operations and as a result the loading operations were under the sole control of the stevedores and the crew of the vessel were not aware of and had no notice of the unsafe condition and could not reasonably have learned of it. Those are not the facts in our case.

Hite v. *Maritime Overseas Corporation,* 380 F.Supp. 222 (E.C. Tex.) and *Fedison* v. *The Vessel Wislica,* 382 F.Supp. 4 (E.C. L.A.) were mentioned in the *Napoli* decision as not properly portraying the present obligations owed by a land owner to one who works upon his premises. The lower court in Napoli was reversed because the charge to the jury was based on the old law as set forth in *Hite* and *Fedison.* It should also be noted that Hite involves defective equipment of a repairman.

In *Citizen* v. *M/V Triton,* 384 F.Supp. 193 (E.D. Tex.) the accident occurred while still stowing the same cargo in the same hold and the method of operation was bad. In *Ramirez* v. *Toko Kaium K.K.,* 385 F. Supp. 644 (N.D. Cal.) the accident occurred due to operational negligence, that is, negligence in the performance or while performing the work. The Amici improperly treated the "manner of performance" of the work as a "condition".

One final comment should be made with respect to the Amici's conclusion that the Congressional objective of protecting the health and safety of employees who work aboard vessels by placing the economic costs of any injured on the stevedore as it is "really" their fault. You do not protect an individual by denying him his legal and socio-economic rights, and here particularly, his right to sue a negligent shipowner when shipowner is the one in a position to best control conditions that exist on board vessels.

CONCLUSION

Judge Weinfeld's Charge to the jury was fair and correct on the facts in evidence and the case was properly submitted to the jury. The denial of the motion for a directed verdict should be sustained.

Respectfully submitted,

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